ARIZONA POWER AUTHORITY
1810 W. Adams Street • Phoenix, AZ 85007-2697
(602) 368-4265 • FAX (602) 253-7970

September 1, 2011

Mr. Darrick Moe
Desert Southwest Regional Manager
Western Area Power Administration
P.O. Box 6457
Phoenix, AZ 85005-6457

Via Email: Post2017BCP@wapa.gov

Re: Boulder Canyon Project – Post-2017 Application of the Energy Planning and Management Program Power Marketing Initiative 76 Fed. Reg. 23583

Dear Mr. Moe:

Pursuant to the Western Area Power Administration ("Western") Federal Register Notice, dated April 27, 2011, 76 Fed. Reg. 23583, the Arizona Power Authority ("Power Authority") respectfully submits the following comments on the Post-2017 remarketing effort for the Boulder Canyon Project ("BCP"):

1) **Western Requested Comments on Four Major Areas of Consideration.** At Western's July 13, 2011 Public Information Forum on the Post-2017 Boulder Canyon Marketing and Allocation Process, Western requested comments specifically on four major areas of consideration as noted below. The Power Authority offers the following responses in subsections a. through d. below:

   a. Western proposes to allocate 2,044 MW to customers and retain 30 MW for Western's use. We understand Western's operational needs and the advantage to Western of retaining 30 MW of Hoover capacity for operational purposes. However, there is no valid need for Western to retain the 30 MW of capacity since they have access to approximately 40 MW through diversity of use among Hoover Contractors. Clearly, the 30 MW is better used by the Hoover Contractors. Furthermore, the Hoover Power Plant Act of 1984 states that Western shall dispose of capacity and energy from the project. It is important to note that the current Hoover Contractors have paid for all upgrades to the Hoover power plant that has resulted in additional generation capacity and energy. It is only fair that the additional capacity and energy made available as a result of these investments are allocated to the current Hoover Contractors. Furthermore, there is a fundamental concern that Western may use this

additional 30 MW outside of the Desert Southwest Region (DSW) since the DSW balancing authority has been merged with the Western balancing authority in the Rocky Mountain Region. Note too, that the Conformed Criteria defines the Marketing Area. Hoover power cannot be used outside of the Marketing Area.

Next, Western proposes to allocate 4,527,001 MWh to the Hoover Contractors. Historically, the Hoover Contractors have received all of the energy generated at Hoover Dam. This energy allocation proposed by Western is consistent with the current allocation and its regulations at 10 CRF Part 904, and we do not object as long as all of the Hoover energy is sold to Hoover Contractors.

b. Western proposes to allocate 1,951 MW of capacity, with 5% less energy to current Hoover Contractors. We object to this proposal and strongly maintain that the Hoover Contractors should receive all of the capacity and energy generated at Hoover Dam. (Reference 10 CFR Part 904.)

c. Western proposes that 93 MW and 5% of the energy should go to a power pool that will be allocated pursuant to the Power Marketing Initiative (PMI) principles. We strongly object to Western's retaining the capacity and energy suggested and the Power Authority will not accept the application of the Power Marketing Initiative to the allocation of Hoover power and energy in 2017. If Western pursues the PMI, the Power Authority will have no choice but to immediately file suit to block Western's action.

d. Western proposes to split excess energy by the proportionate share of each contractor's annual firm energy percentage allocation. The allocation of excess energy generated at Hoover Dam should not be changed from the current allocation methodology, where the Power Authority receives the first 200,000 MWh of excess energy and the remainder of excess energy is split a third, a third, a third to the states of Arizona, California and Nevada. There is no logical reason or justification for changing this allocation process and the proposal is contrary to Western's own regulations, 10 CFR Part 905. Furthermore, there is no offsetting compensation to Arizona for slighting them in this new proposal and Arizona strongly objects to this proposal.

The Power Authority also offers the following additional comments on the Post-2017 BCP Marketing Process:

2) **Western Cannot Apply the EPAMP PMI Regulations to the Post-2017 Boulder Canyon Marketing and Allocation Process ("Post-2017 BCP Marketing Process").** Western proposed in its initial notice commencing the Post-2017 Boulder Canyon Marketing and Allocation Process to apply the Power Marketing Initiative (PMI) regulations in Subpart C of the Energy Planning and Management Program, 10 CFR Part

905 to the Boulder Canyon Project: "Western now proposes to apply the PMI to the long-term power contracts of the BCP". 74 Fed. Reg. 60256.
In every subsequent notice and public statement on the topic, Western has consistently confirmed this course of action. See e.g, 75 Fed. Reg. 19966 (April 16, 2010). Subsequently, Western formally adopted this proposal: "The Western Area Power Administration…will apply the Energy Planning and Management Program (Program) Power Marketing Initiative (PMI), as modified in this notice, to the Boulder Canyon Project (BCP), as proposed in a Federal Register Notice published on November 20, 2009." 76 Fed. Reg. 23583 (April 27, 2011).

Yet, since the first November 2009 Federal Register Notice and for the entire length of this process, Western has never offered any justification for applying the PMI to the Post-2017 Marketing Process. Perhaps that is because under applicable law, and as detailed in section 10 below, there is none.

Western's decision to apply PMI to the Post-2017 BCP Marketing Process is legally incorrect as will be detailed herein, and also contrary to the commitments it publicly made in 1995 when it originally published the PMI regulations. Finally, seven U.S. Senators including Senators from all of the states in the Boulder City Marketing Area signed a May 24, 2011 letter to Western admonishing Western not to apply the PMI to the Post-2017 BCP Marketing Process. See Attachment A.

3) **Power Authority Confirms Written Comments Submitted on January 29, 2010.** The Power Authority submitted written comments dated January 29, 2010 to Mr. Derrick Moe, Desert Southwest Regional Manager on the Post-2017 BCP Marketing Process. The Power Authority references and confirms the comments, except to the extent those comments are revised herein.

4) **Power Authority Confirms Comments Submitted Orally at the August 17, 2011 Hoover Post-2017 Public Comment Forum.** On August 17, 2011, Western held a Public Comment Forum (Forum) at Western's Desert Southwest Offices in Phoenix, Arizona. Western took additional comments on the above-captioned topic at the Forum. A court reporter transcribed the comments offered by the various commenters. Douglas V. Fant, counsel for the Power Authority, spoke on behalf of the Power Authority. Mr. Fant offered a number of additional comments to Western at the Forum on whether Western may apply the Energy Planning and Management Program to the Boulder Canyon Project in the Hoover Post-2017 Power Marketing Initiative. The Power Authority confirms Mr. Fant's oral comments made on the record at the Forum, except to the extent those comments are revised herein.

5) **No Waiver of Statutory Rights under the Boulder Canyon Project Act of 1928.** In an effort to resolve serious differences in the interpretation of the provisions of the Boulder Canyon Project Act of 1928 and as a result of litigation filed against Western by the State

of Nevada, the Hoover Contractors collaborated and developed a legislative solution for the then-pending 1987 re-allocation of Hoover Power. The effort resulted in the passage of the Hoover Power Plant Act of 1984. P.L. 98-381, 98 Stat 1333.
The law sought to accomplish three primary goals. First, the law statutorily allocated Hoover power for the 1987-2017 time period. Second, the law required the dismissal of the lawsuit filed by the State of Nevada against Western. Third, the law preserved and "rolled forward" for future resolution in 2017, all of the Contractors' disputes over the proper interpretation of the provisions of Boulder Canyon Project Act of 1928.

For that reason, the Hoover Power Plant Act of 1984 contained two provisions that expressly preserved rights of parties under the 1928 Act:

> "Except as amended by this Act, the Boulder Canyon Project Act of 1928 (45 Stat 1057, as amended, 43 U.S.C. §617 et seq.) as amended and supplemented, shall remain in full force and effect." Section 103(b) Hoover Power Plant Act of 1984; 98 Stat. 1333.

Next, Section 105(B) of the Hoover Power Plant Act of 1984 stated in reference to the Conformed Criteria that: "[n]othing in the Criteria shall be construed to prejudice any rights conferred by the Boulder Canyon Project Act, as amended and supplemented, on the holder of a contract described in subsection (a) of this section not in default thereunder on September 30, 2017."

In summary, the purpose of these two provisions is clear. The rights of the Contractors under the terms of Boulder Canyon Project Act of 1928 are preserved, and the terms of the Boulder Canyon Project Act of 1928, therefore, represent the proper and primary source for Western's authority to allocate Hoover power.

6) **The Terms of Boulder Canyon Project Act of 1928 Govern the Post-2017 BCP Marketing Process**. As noted in section 105(g) of the Hoover Power Plant Act of 1984 Congress reserved the right to allocate capacity and energy under section 5 of the Boulder Canyon Project Act of 1928. 43 U.S.C. §619a(g). Section 5 of the Boulder Canyon Project Act establishes the basic statutory requirements applicable to allocation of Hoover power:

> " "The Secretary of the Interior is hereby authorized under such general regulations as he may prescribe, to contract for...generation of electrical energy and delivery at the switchboard to states, municipal corporations, political subdivisions, and private corporations of electrical energy at said dam."

> "General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under Subsection (6) of this section, and in making such contracts, the following shall govern:
>
> > (c) "Applicants for purchase of water and electrical energy; preferences."
>
> "Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefore who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Power Act (16 U.S.C. 791a et seq.) as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant shall be given, first, to a state for the generation or purchase of electric energy for use in the state, and the states of Arizona, California and Nevada shall be given equal opportunity as such applicants". 43 U.S.C. §617d(c)." "

In summary, section 5 of the Boulder Canyon Project Act of 1928 establishes the following priorities for the allocation of power from Hoover Dam. The first priority to the power from the Project goes in equal opportunity to the states of Arizona, California, and Nevada as applicants for Hoover power. Subsequently, the power referenced above may be further allocated within the Marketing Area primarily pursuant to priorities developed by the Solicitor of the U.S. Department of the Interior in the 1930's. See Boulder Canyon Project, Opinion of the Solicitor of the Department of the Interior, January 6, 1930 (Finney Opinion).

7) **The Hoover Power Plant of 1984 Ratified the Conformed Criteria.** Section 105(a)(1)(C)(4)(C) of the Hoover Power Plant Act of 1984 states:

> "each contract offered under subsection (a)(1) of this section shall:...(C) conform to the applicable provisions of subdivision E of the Criteria, commencing at 48 Federal Register 20881, modified as provided in this section. To the extent that said provisions of the Criteria, as so modified, are applicable to

> contracts entered into under this section, those provisions are hereby ratified."

That is, the Hoover Power Plant Act of 1984 required Western to make certain changes in its original May 9, 1983 version of the Conformed General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects. 48 Fed. Reg. 20872, May 9, 1983. Western responded to the above language contained in the Hoover Power Plant Act of 1984 and on December 28, 1984, published a revised version of the Conformed General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects, known as the "Conformed Criteria" 49 Fed. Reg. 50582, December 28, 1984.

Congress, in section 105(a)(1)(C)(4)(C) of the Hoover Power Plant Act of 1984, then ratified those portions of the Conformed Criteria applicable to the new Hoover power contracts.

Collectively, the Hoover Power Plant Act of 1984 ratified Subsection C of the Conformed Criteria, which are the marketing regulations applicable to the Boulder City Area Projects. The legislative history of the Act confirms that interpretation, stating that "Section 205(a)(4) … constitutes a legislative ratification of the marketing criteria as modified…" H.R. 4275 Report No. 98-648, 98th Congress, 2d Sess., April 3, 1984 at p. 18.

In *Hassett v. Welch*, 303 U.S. 303, 58 S. Ct. 559, 82 L. Ed. 858 (1938), the U.S. Supreme Court noted that the effect of a legislative ratification "is a well-settled canon of statutory construction:

> Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily in to the adopting statute….Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent" (quoting 2 Sutherland on Statutory Construction 787-88, 2d ed. 1904).

Subsequent Federal Circuit Court case law has clarified that the rule of construction applies not merely statute to statute, but to incorporation of any item that is "certain and readily available:"

> "Incorporation by reference is a form of legislative shorthand; the effect of an incorporation by reference is the same as if the

> referenced material were set out verbatim in the referencing statute. A legislature – for example, a city council – may look to an infinite variety of sources to reference in crafting its law as long as the referenced material is both certain and readily available." *Artistic Entertainment, Inc. v. City of Warner Robins*, 331 F. 3d 1196, 1206 (11th Cir. 2003).

In summary, the ratification language contained in the Hoover Power Plant Act of 1984 satisfies these judicial requirements and the ratification thereby incorporates Boulder Canyon Project-related elements of Subdivision C of the Conformed Criteria (which are the power marketing requirements for the Boulder City Area Projects) into the Boulder Canyon Project Act of 1928 itself.

8) **The Boulder Canyon Project-Related Conformed Criteria Apply to the Post-2017 BCP Marketing Process.** As noted in the preamble to the Conformed Criteria, The Conformed Criteria "contain[..] the principles and guidelines for the marketing of power from the Boulder Canyon Project, Parker-Davis Project, and the Navajo Generating Station…." 49 Fed. Reg. 50582. "This document … will serve as the regulations for contract renewal and for the sale of power from the Boulder Canyon Project"…. By consolidating the marketing of power from these Projects under common guidelines, the Federal system can be operated at improved efficiency within the constraints imposed by law, regulations, and treaties. Id. at 50584.

Two major items delineated in the Conformed Criteria apply to the Post-2017 BCP Marketing Process. Those relate to Contractors' use of the dynamic signal associated with capacity from Hoover Dam, and to the definition of the proper marketing area.

The Conformed Criteria authorize Contractors at Hoover Dam to use the dynamic signal associated with the capacity allocated from Hoover Dam to each contractor:

> "Western, within the constraints of river operation, intends to permit each Boulder Canyon Project power contractor to schedule loaded and unloaded synchronized generation, the sum of which cannot exceed the amount of capacity reserved for the renewal offer to the individual Contractors. To the extent that energy entitlements are not exceeded, such previously scheduled unloaded synchronized generation may be used for regulation, ramping, and spinning reserves through the use of a dynamic signal". Id. At 50585.

In addition, in its Appendix A, the Conformed Criteria specify the Marketing Area for the Boulder City Area Projects, including the Boulder Canyon Project. The Marketing Area

"consists generally of southern California, southern Nevada, most of Arizona, and a small part of New Mexico." Id.

In summary, we believe that the Hoover Power Plant Act of 1984 in ratifying the Conformed Criteria gave Contractors access to the dynamic signal and the definition of the Marketing Area the force of federal law.

9) **Western's General Regulations for the Charges for the Sale of Power from the Boulder Canyon Project Apply to the Post-2017 BCP Marketing Process.** In 1986, Western published updated General Regulations in support of the BCP marketing and allocation process. 51 Fed. Reg. 43154, November 28, 1986. The regulations confirmed the applicability of the Conformed Criteria and the General Regulations to the marketing and allocation process:

> "Capacity and energy available from the Project will be marketed by Western under terms of the Conformed General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects (Conformed Criteria) published in the FEDERAL REGISTER (49 FR 50582) on December 28, 1984. Western shall dispose of capacity and energy from the Project in accordance with section 105(a)(1) of the Hoover Power Plant Act (43 U.S.C. 619(a)(1)), these General Regulations, and the Contracts between the Contractors and Western." 10 CFR §904.4 Marketing Responsibilities.

The General Regulations contain terms applicable to the "disposal of capacity and energy" through the Post-2017 BCP Marketing Process. The General Regulations define three terms of relevance, "capacity", "excess capacity", and "contractor." 10 CFR §904.3.

"Capacity" is defined to be: "...the aggregate of contingent capacity specified in section 105(a)(1)(A) and the contingent capacity specified in section 105(A)(1)(B) of the Hoover Power Plant Act. (43 U.S.C. 619)". That amounts to 1,951,000 kW of contingent capacity from Hoover Dam. 10 CFR §904.3(c).

Next, "Excess Capacity" is defined to be: "...capacity which is in excess of the lesser of: (1) Capacity that Hoover Powerplant is capable of generating with all units in service at a net effective head of 498 feet, or (2) 1,951,000 kW." We shall assume that any capacity in excess of 1,951,000 kW is excess capacity. 10 CFR §904.3(h).

The General Regulations then define what Western should do with the "Excess Capacity":

> "If the Uprating Program results in Excess Capacity, Western shall be entitled to such Excess Capacity to integrate the operation of the Boulder City Area Projects and other Federal Projects on the Colorado River. Specific criteria for the use of Excess Capacity by Western will be provided by Contract. All Excess Capacity not required by Western for the purposes specified by Contract will be available to all Contractors at no additional costs on a pro rata basis based on the ratio of each Contractor's Capacity allocation to the total Capacity allocation." 10 CFR §904.9(a).

That is, Western may retain a portion of the Excess Capacity for purposes of system integration as specified in the Contractors' power contracts. The remainder of the Excess Capacity is then returned on a pro rata basis to the Contractors.

Finally, the General Regulations define Contractors to include only "...the entities entering into contracts with Western pursuant to the Hoover Power Plant Act". 10 CFR §904.3(g). Those entities are the Arizona Power Authority, Colorado River Commission, Metropolitan Water District, City of Los Angeles, Southern California Edison Company, City of Glendale, CA., City of Pasadena, CA., City of Burbank, etc., and Boulder City, NV

Next, the General Regulations define "Firm Energy" to be: "...energy obligated from the Project pursuant to 105 (a)(1)(A) and section 105 (a)(1)(B) of the Hoover Power Plant Act (43 U.S.C. 619)." 10 CFR §904.3(j). Collectively, that designates 4,527,001 kWh of energy as Firm Energy to be delivered to the Contractors.

Finally, the General Regulations define "Excess Energy" to be: "...energy obligated from the Project pursuant to section 105 (a)(1)(C) of the Hoover Power Plant Act (43 U.S.C. 619)." This energy is generally known as "C" energy. The General Regulations ratify and adopt the "C" energy allocation priorities contained in the Hoover Power Plant Act as Western's ongoing method for managing "C" energy generated from the Boulder Canyon Project:

> "If excess Energy is determined by the United States to be available, it shall be made available to the Contractors, in accordance with the priority entitlement of section 105(a)(1)(C) of the Hoover Power Plant Act (43 U.S.C. 619(a)(1)(c))." 10 CFR §904.10(a).

In summary, the General Regulations require that a minimum of 1,951 MW of capacity be allocated to "Contractors" at the Boulder Canyon Project. Western has a right to employ a certain amount of the Boulder Canyon Project capacity available over the 1,951 MW level for federal project integration purposes as specified in the term of the

Contractors' power contracts. The remainder of the excess capacity is then cycled back, added to the base 1,951 MW available, and then allocated to the Contractors.

Next, the General Regulations define "eligible Contractors" to include the current nine Contractors at the Project. The amount of energy to be offered in the marketing and allocation process is 4,527,001 MWh's of energy. Any energy available to Western and in excess of that amount must be allocated to the Contractors pursuant to the priorities currently applicable to "C" energy from the Dam.

10) **The EPAMP PMI Regulations Cannot Be Applied to the Post-2017 BCP Process.** As early as 1981, Western proposed the concept of weighing its customers' compliance with conservation requirements in the future allocation of Federal resources. On September 22, 1981, Western published its "Proposed General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects". (46 Fed. Reg. at 46864).

In Part VII of the 1981 Marketing Criteria, Western proposed general elements to achieve conservation objectives as authorized under the Department of Energy Organization Act of 1977. Western required each contractor to prepare, implement, and maintain a conservation program before a contractor applies for Federal power. Part II(4) of the 1981 Criteria states, in part:

> "The Contractor's record in the development, implementation, and maintenance of a conservation program will be considered in the allocation of future Federal resources and the future marketing of existing resources". Id. at 46870.

Subsequently, Section II of the Hoover Power Plant Act of 1984 required any "long-term firm power service contract entered into or amended subsequent to one year from the date of enactment of this Act ... to contain an article requiring the development of and implementation by the purchaser thereunder of an energy conservation program." Section 201(a). Congress also directed Western to amend its existing regulations and include elements of an energy conservation program. Section 202(a); 50 Fed.Reg. 33892, August 21, 1985.

Congress subsequently enacted the Energy Policy Act of 1992. Section 114 of the Act entitled "Amendment of Hoover Power Plant Act of 1984" amended Section II of the Hoover Power Plant Act of 1984 to replace energy conservation programs with "integrated resource planning." Pub.L. 102-486, 106 Stat 2776, 42 U.S.C. §7275 et seq.

The terms mimicked and modestly expanded the conservation planning requirements contained in Section 201 of the Hoover Power Plant Act of 1984:

> "integrated resource planning" means "a planning process for new energy resources that evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications, and renewable energy resources, in order to provide adequate and reliable service to its electric customers at the lowest system cost. The process shall take into account necessary features for system operation, such as diversity, reliability, dispatch ability and other factors of risk; shall take into account the ability to verify energy savings achieved through energy conservation and efficiency and the projected durability of such savings measured over time; and shall treat demand and supply resources on a consistent and integrated basis".
> Section 201(2); 42 U.S.C. 7275(2).

Section 202(a) then required Western again to amend its conservation and planning regulations "...to require each customer purchasing electric energy under a long-term firm power service contract with the Western Area Power Administration, to implement, within three years after enactment of this section, integrated resource planning in accordance with requirements of this title". 42 U.S.C. 7276(a).

Western is required to approve an integrated resource plan, if the customer plan contains various elements such as least cost options for providing electrical service to retail customers, load forecasting, methods to validate predicted performance, and minimizing adverse environmental impacts of new resource acquisitions. 42 U.S.C. 7276b(b).

a. ***EPAMP Regulations.*** In April 1991, Western proposed an Energy Planning and Management Program. (56 Fed. Reg.16093). Western stated that "...[t]he goal of the Program was to require planning and efficient electric energy use by Western's long-term firm power customers and to extend Western's firm power resource commitments". 60 Fed. Reg. 54151 (October 20, 1995). The Program contained two elements: (1) an integrated resource planning initiative "conforming to the requirements of the Energy Policy Act"; and (2) a Power Marketing Initiative. After passage of the Energy Policy Act passed in 1992, Western noted that section 114 of the 1992 Act also "requires the preparation of integrated resource plans (IRP) by Western's customers." Id. at page 54151.

   Western also noted that the new 1995 IRP provisions to its 1995 regulations "...will amend Western's Final Amended Guidelines and Acceptance Criteria for Customer Conservation and Renewable Energy Programs of August 21, 1985 (50 Fed. Reg. 33892)."

b. ***EPAMP and the Hoover Post-2017 Marketing and Allocation Process.*** Would the PMI apply to the Post-2017 marketing/allocation process under the Boulder Canyon Project Act of 1928? First, note that Western received a number comments objecting to any attempt to apply the PMI regulations to the Boulder Canyon Project as the proposed PMI regulations were contrary to applicable federal law. As a result, Western declined to attempt to apply PMI to the Boulder Canyon Project at that time. Instead, Western stated in the preamble to its EPAMP Regulations that Western "... proposed to evaluate application of the PMI to the Parker-Davis Project and the Boulder Canyon Project no sooner than ten years before existing contracts expire." In addition, Western committed publicly that "No decision to apply the PMI [to the Boulder Canyon Project] will take place until an appropriate public process takes place." 60 Fed. Reg. 54157 (October 20, 1995).

No such process has taken place. In addition, despite repeated requests to Western to clarify the legal basis for its final decision to apply PMI to the Post-2017 BCP Marketing Process, Western has never offered any sort of explanation for its use.

Now turning to the substantive question of whether the PMI apply to the Post-2017 marketing/allocation process under the Boulder Canyon Project Act of 1928. The answer to that substantive question is no. First, the provision, which statutorily authorized EPAMP provision as well as the provision for allocation of Hoover power, appears in the same statute, the Hoover Power Plant Act of 1984. Section 105(a)(1) specifies a statutory allocation for Hoover power. Subsection (g) then notes that the statutory allocation: "...constitutes an exercise by the Congress of the right reserved by it in section 5(b) of the Boulder Canyon Project Act...to prescribe the terms and conditions for the renewal of contracts for electrical energy generated at Hoover Dam. This section constitutes the exclusive method for disposing of capacity and energy from Hoover Dam for the period beginning June 1, 1987, and ending September 30, 2017". Id.

Subsection (i) then goes on to note: "[i]t is the purpose of subsections (c), (g), and (h) of this section to ensure that the rights of Contractors for capacity and energy from the Boulder Canyon project for the period beginning...1987 and ending...2017 will vest with certainty and finality". Id.

Finally, subsection 103(b) states that "[e]xcept as amended by this Act, the Boulder Canyon Project Act of 1928...as amended and supplemented, shall remain in full force and effect". Id.

Subsection (g) notes that Congress reserved the right to allocate capacity and energy under the Boulder Canyon Project Act of 1928. Subsection (i) intended firmly to vest Hoover allocations from 1987 to 2017. Therefore, it is unlikely that Congress

intended the generic conservation planning requirements contained in another provision of the same Act to upset or supersede these statutory requirements, which are intended to vest with "finality and certainty."

In fact, Title II of the Act does not state that Title II's conservation planning requirements should supersede any inconsistent statutory provisions in the Hoover Power Plant Act of 1984 or any other act. Title II instead states the converse. That is, any planning requirement under other similar energy conservation laws will also satisfy the requirements of Title II. See also 10 CFR § 905.30(b): "The PMI applies to covered projects to the extent it is consistent with other contractual and legal rights, and subject to any applicable project-specific environmental requirements."

Next, unless stated to the contrary in the statute itself, one should interpret statutory provisions of a statute so as to give effect to each of the statute's provisions. It is also presumed that a statute will be interpreted so as to be internally consistent. A particular section of the statute shall not be divorced from the rest of the act. Here subsection 103(b) specifically maintains the provisions of the Boulder Canyon Project in effect, including Congress' power to allocate Hoover capacity and energy. It is highly unlikely that Congress intended to negate that directive obliquely or by implication through another provision of the same law.

Additionally, Section 9 of the 1987 Western-Arizona Power Authority Electric Service Contract No. DE-MS65-86WP39574 contains a Conservation and Renewable Energy Program based upon the original language of Title II of the Hoover Power Plant Act of 1984 and includes "Final Guidelines and Acceptance Criteria for Customer Conservation and Renewable Energy Programs published in the Federal Register on August 21, 1985 (50 Fed. Reg.33892 et seq.), and any subsequent amendments thereto...."

Finally, section 105(a)(1)(C)(4) of the Hoover Power Plant Act of 1984 states that "[e]ach [power] contract offered under subsection (a)(1) of this section shall expire September 30, 2017." The existing power contracts are mandated by federal law to expire on September 30, 2107. For that reason, there will be no contracts that can be administratively extended by Western pursuant to 10 CFR 905.30 under its PMI initiative, and thus the EPAMP PMI regulations are not applicable to the Post-2017 BCP Marketing Process.

In summary, Western in 1995 committed to hold a public process in order to consider whether the PMI may be applied to the Post-2017 BCP Marketing Process. Western owes its customers an explanation of why that process has not taken place, and has not offered any basis or justification for attempting to apply the PMI to the Post-2017 BCP Marketing Process. In any case, the above analysis shows that the PMI regulations are not applicable to the Post-2017 BCP Marketing Process.

11) **Allow Ongoing Legislative Effort to Address Issues in BCP Marketing and Allocation Process.** Finally, Power Authority notes that the existing Hoover power Contractors, including the Power Authority, have jointly developed a legislative proposal, the Hoover Power Allocation Act of 2011. Majority Leader Harry Reid introduced the proposed legislation known as S. 519 in Congress in March 2011, while the House version of the same legislation H.R. 470, enjoys 34 co-sponsors.

The legislation will protect the economic health of vast numbers of ultimate power consumers within the states of Arizona, California and Nevada who rely on the hydro-power output of the Hoover Dam, and will also ensure reliable water delivery in these three states. The Power Authority supports the efforts to have the legislation passed and enacted into law, which, if enacted, this Legislation would impact the current Western marketing and allocation process.

Similarly, the Power Authority also supports the suggestion made by Colorado River Commission representative at Western's August 17, 2011 Public Comment Forum that Western consider delaying any further action on the allocation process until June 30, 2012. This will allow time for the Congress to take action on the proposed Hoover legislation and will possibly avoid a great deal of unnecessary work and, perhaps, legal action.

The Power Authority appreciates this opportunity to provide comments on Western's Post-2017 remarketing initiative.

Respectfully submitted,

Douglas V. Fant

Douglas V. Fant
For Arizona Power Authority